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IN THE

Supreme Court of the United States

OCTOBER TERM 1996

SOUTH AFRICAN AIRWAYS,

Petitioner,

—v.—

BRINK'S LIMITED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in construing Article 25 of the Warsaw Convention, which requires, in order to avoid the limitation of liability provisions of the Convention, that a determination of "wilful misconduct" or equivalent default be made "in accordance with the law of the Court to which the case is submitted," by holding that the law of the Republic of South Africa and not the substantive law of the forum New York must be applied?

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Petitioner South African Airways ("SAA") respectfully prays that a writ of certiorari be issued to review a decision of the United States Court of Appeals for the Second Circuit (*Brink's Limited v. South African Airways*, 93 F.3d 1022 (2d Cir. 1996)) which reversed a decision and judgment of the United States District Court for the Southern District of New York and remanded the matter for a determination of certain issues under the laws of the Republic of South Africa. (A. 1a-30a).* The District Court, pursuant to the limitation of liability provisions of Article 22(2) of the Warsaw Convention, had granted partial summary judgment in favor of SAA and had entered a judgment for plaintiff, Brink's Limited ("Brink's"), limited to $1,522. The opinion of the United States District Court is unofficially reported at 1995 WL 225602. (A. 31a-37a).

THE PARTIES

The only parties in this proceeding are those identified in the caption. Petitioner SAA is a division of Transnet Limited, which is wholly owned by the government of the Republic of South Africa.

JURISDICTION

The judgment of the Court of Appeals was entered on August 8, 1996. SAA's petition for rehearing was denied by order entered September 20, 1996. (A. 40a-41a). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

PROVISIONS OF LAW INVOLVED

This case raises the interpretation of Article 25 of the Warsaw Convention, known formally as the Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in 49 U.S.C. § 1502 note (the "Warsaw Convention").

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* References to "(A. _____") are to the Appendix to the Petition.

Article 25 of the Warsaw Convention, as codified by 49 Stat. 3000 T.S. 876, states:

> (1) The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful mis-conduct or by such default on his part as, in accordance with the law of the Court to which the case is submitted, is considered to be equivalent to wilful mis-conduct.
>
> (2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

Statement of the Case[1]

Jurisdiction in the federal court was predicated under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602, *et seq.* because SAA is wholly owned by the government of the Republic of South Africa. The Warsaw Convention provided the basis for the cause of action.

Rustenburg Platinum Mines Limited ("Rustenburg") contracted for SAA to transport boxes of unrefined precious metals by air from Johannesburg, South Africa, to New York, pursuant to an airway bill dated September 10, 1992; the air waybill did not contain a declaration of the value of the cargo. Rustenburg also contracted for Brink's, a corporation organized under the laws of England and Wales, to provide security for the shipment and to indemnify Rustenburg for any losses. At some time between the arrival of thirty-four boxes of the precious metals at approximately 1 p.m. on September 10, 1992 at SAA's high value cargo vault at Jan Smuts Airport in Johannesburg and the arrival of the shipment the next day at a British Airways cargo facility at John F. Kennedy Airport in New York, six boxes of precious metals worth nearly $1.8

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[1] This summary of the facts is based upon the recitation contained in the opinion of the Court of Appeals.

million disappeared out of a locked and sealed air cargo container.

Before being placed in the cargo vault at the Jan Smuts Airport, the thirty-four boxes were counted by the courier for the shipment (Lt. Gen. Malan of the South African Police ("SAP"), the SAP officer assigned to the vault (Sergeant Engelbrecht), the vault foreman, another SAP officer, and an employee of the freight forwarding company. Thereafter, the boxes were marked with air waybill labels and placed in an all-metal container, designated AVE 1617, bound for New York.

After padlocks had been affixed to the container, Sergeant Engelbrecht noticed that despite the padlocks, the door to AVE 1617 still could be opened. He informed Lt. Gen. Malan of the problem and asked the vault foreman to provide a container that could be locked. The vault foreman advised him that no other containers were available. Thereafter, SAP and SAA personnel closed and locked the high value cargo vault.

That evening, SAA personnel opened the vault, removed container AVE 1617, loaded it on a dolly and transported it from the cargo facility to SAA Flight 201, destined for New York. An armed SAP escort, including Lt. Gen. Malan, accompanied the container. Lt. Gen. Malan then departed, leaving one SAP Constable planeside to guard the shipment.

Two SAA cargo loaders loaded the container on board. Except for a two-to-three minute interval, a SAA loadmaster supervised the loading process. After container AVE 1617 was loaded into the hold, the SAP Constable positioned himself where he allegedly could see the stowage location of the container. It took 20 to 60 minutes to load the remaining cargo into the hold, as a result of which container AVE 1617 was "buried" in the hold.

The aircraft departed Jan Smuts Airport at 8:08 p.m. It made a regularly scheduled refueling stop at Ilha Do Sal in the Cape Verde Islands. Although cargo was removed from the front holds in Ilha Do Sal, no cargo was removed from the

hold containing AVE 1617. Except for a short period of time while he was in the rest room, Lt. Gen. Malan observed the rear cargo hatch to that hold and testified that it was not opened at any time during the stopover.

The aircraft arrived at John F. Kennedy International Airport at approximately 6:30 the following morning. SAA security personnel met the aircraft, obtained the padlock keys from Lt. Gen. Malan, and proceeded rampside, where the hold containing AVE 1617 had been opened but not off-loaded. The SAA personnel observed the off-loading of AVE 1617 and confirmed that the locks and seals were intact. Both the SAA personnel and Port Authority police escorted the container to a cargo facility of another airline. There the container was opened in the presence of Brink's and SAA representatives, who immediately determined that six boxes of the precious metals, worth approximately $1,789,012.07, were missing from the shipment.

The Port Authority police, SAA and the Gold and Diamonds Branch of the SAP have investigated the disappearance of the six boxes. Despite an apparently thorough investigation, there have been no arrests or convictions and the boxes have not been recovered. Although SAP bulletins posted an award to refiners handling similar materials, no sale or attempted sale was ever reported. In sum, neither the police authorities nor anyone else has been able to determine when, where or by whom the six boxes of precious metals weighing approximately 170 pounds disappeared from the locked and sealed container AVE 1617.

Under its agreement with Rustenburg, Brink's indemnified Rustenburg for the entire loss. The gravamen of Brink's complaint is that the six boxes were stolen while in the custody of SAA and that the limitation of liability provisions of Article 22(2) of the Warsaw Convention,[2] which would limit SAA's

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[2] Article 22(2) of the Convention provides:

> In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilo-

liability to 250 francs per kilogram or approximately $9.07 per pound, are inapplicable by reason of the "wilful misconduct" provisions of Article 25 of the Convention. Specifically, Brink's contends that SAA is not entitled to avail itself of the limitation of liability provisions of Article 22(2) because SAA and/or SAA's employees engaged in wilful misconduct and that such misconduct proximately caused the loss.

After extensive discovery, SAA moved for partial summary judgment that its liability be limited to $1,522 in accordance with Article 22(2) of the Convention.

THE OPINIONS BELOW

(i) The Opinion of the District Court.

In granting partial summary judgment in favor of SAA, the District Court first noted that in order to avoid the liability limitation of Article 22(2), Brink's must plead and prove facts showing (a) that SAA engaged in wilful misconduct and (b) that this wilful misconduct was the proximate cause of the loss of the six boxes. (A. 33a; 93 F.3d at 1027).

Even accepting for sake of argument Brink's contention that SAA employees stole the boxes, the District Court held that under the law of New York—the forum—SAA did not engage in wilful misconduct and thus is entitled to the protection of the Article 22(2) limitation of liability. In so doing, the District Court relied on *Rymanowski v. Pan American World Airways, Inc.*, 70 A.D.2d. 738, 416 N.Y.S.2d 1018 (3d Dept. 1979), *aff'd*, 49 N.Y.2d 834, 427 N.Y.S.2d 795, 404 N.E.2d 1336 (1980) and its federal court progeny which hold

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gram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

As noted above, Rustenburg's air waybill did not contain a declaration of the value of the cargo.

that thefts by airline employees are not committed in furtherance of the employees' duties and that SAA would not lose its limitation of liability protection under the Warsaw Convention even if it were proven that an SAA employee stole the six boxes. (A. 34a). The District Court wrote:

> Apparently, every American court to address this issue has held that the wilful misconduct exception to the Warsaw Convention's limitation of liability does not apply to acts of theft committed by employees.

(A. 34a).

(ii) The Opinion of the Court of Appeals

After reciting the facts discussed above (pp. 2-5 *supra*), the Second Circuit held that the plain language of Article 25 of the Convention meant that " 'wilful misconduct' [must be determined] under the law of the forum jurisdiction." (A. 10a; 93 F.3d at 1028). The Court of Appeals also rejected Brink's argument that there was an "international interpretation" of Article 25 and instead wrote:

> [W]e believe that the drafters of the Convention recognized the possibility of conflicting national policies with respect to imputing liability to a carrier, but unmistakably resolved any conflict by deferring to the law of the forum jurisdiction . . . . In short, the literal language of Article 25 refers to the law of the forum jurisdiction for a determination of what conduct constitutes wilful misconduct by an air carrier. Moreover, even traditional interpretive techniques, foreclosed by the clarity of Article 25, would not produce a definitive, let alone contrary, interpretation of Article 25. Thus, the law of the United States determines what conduct will deprive an air carrier of limited liability protection.

(A. 11a, 13a; 93 F 3d at 1028-9).

Citing this Court's recent decision in *Zicherman v. Korean Air Lines Co.*, ___ U.S. ___, 116 S.Ct. 629, 133 L. Ed. 2d 596 (1996), which interpreted Articles 17 and 24 of the Conven-

tion, the Court of Appeals held that the Warsaw Convention does not empower federal courts to develop some general federal common law in derogation of otherwise applicable law (A. 14a; 93 F.3d at 1029). The Court of Appeals determined that the Warsaw Convention deferred to United States law, which in turn would apply the FSIA, which in turn would pass through to the applicable state law, i.e., the law of the forum. (A. 15a; 93 F.3d at 1030). The Court of Appeals concluded that since New York law would control, New York choice of law rules must also be applied. *Id.*

The Court of Appeals then reviewed New York's contract "grouping of contacts" approach and its "torts interest analysis" choice of law rules and concluded that South African substantive law, not New York substantive law, should determine whether SAA was guilty of wilful misconduct. (A. 16a-20a; 93 F.3d at 1030-32). Since the District Court had applied New York substantive law in concluding that Brink's had not established SAA's wilful misconduct, the Court of Appeals remanded the matter for a determination of liability under South African law.[3] (A. 20a-21a; 93 F.3d at 1032).

ARGUMENT

I. The Decision of the Court of Appeals Below Conflicts With Both the Language and Intent of the Warsaw Convention and the Prior Uniform Construction of "Wilful Misconduct" in Article 25.

In interpreting the Warsaw Convention, a court must be governed by the text of the Convention where it is clear. *Chan v. Korean Air Lines*, 490 U.S. 122, 109 S. Ct. 1676, 1864-5, 104 L. Ed. 2d 113 (1989).

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[3] On other issues, the Court of Appeals affirmed the District Court's rulings in SAA's favor that the air waybill satisfied the requirements of Articles 8 and 9 of the Warsaw Convention. (A. 29a; 93 F.3d at 1032-36).

In addition to Article 25, a number of other provisions of the Warsaw Convention require the court to make determinations in accordance with the provisions of the forum's own law. *See, e.g.*, Article 21 (requiring application of the forum's "own law" to determine whether plaintiff's contributory or comparative negligence exonerates the carrier wholly or partly from liability); Article 22(1) (allowing periodical payments of damages "in accordance with the law of the court to which the case is submitted"); Article 28(2) (procedural issues "shall be governed by the law of the Court to which the case is submitted"); Article 29(2) (requiring statute of limitations to be determined under the law of the forum).

Article 25's use of the phrase "in accordance with *the law of the court to which the case is submitted*" is similar to, or in some instances identical with, the language of Articles 21, 22(1), 28(2) and 29(2). Since the Convention used the phrase "shall be governed by the law of the court to which the case is submitted" to ascertain "[q]uestions of procedure" in Article 28, or to ascertain "[t]he method of calculating the period of limitation" in Article 29(2), and used the identical phrase in Article 25 to determine "wilful misconduct" or its equivalent, the drafters clearly were looking at the *lex fori* without reference to conflict rules.

Commentators on the Convention thus have repeatedly pointed out that in the specific instances when the Convention specifies that "applicable law of the forum be applied," the drafters of the Convention intended that the law must be substantive law of that court dealing with the case for "[o]therwise, namely if the court were to refer to its conflict rules, uncertainty of the law would again raise its ugly head and the very purpose of the convention would be destroyed." Mankiewicz, *The Liability Regime of the International Carrier*, § 20, at pp. 15-16 (1981 ed.).

Accord Miller, *Liability in International Air Transport*, at p. 169 (1977 ed.):

> By providing that it is in 'accordance with the provisions of its own law' that the court may exonerate the carrier wholly or partly from his liability, Article 21 seems to indicate that the applicable law will be the *substantive lex fori*.
>
> This interpretation is consistent with almost all of the cases applying Article 21. It is the only interpretation satisfying the purpose of the drafters of the Article, who were afraid that the Convention might introduce provisions contrary to the tradition of the *lex fori*. Article 21 was designed to allow the application of these traditions.

Miller also demonstrates that the drafters of the Convention for similar reasons insisted that the *lex fori*—the substantive law of the forum without application of choice of law conflicts rules—determine "wilful default" or its equivalent in common law countries, or "dol" or its equivalent under the French text. See, Miller, *Liability in International Air Transport*, *supra* at 79-80.

Petitioner respectfully asserts that the Court of Appeals erred when it declared that it had to "pass-through" the Warsaw Convention to United States law, and then pass through the FSIA to reach application of New York law. (93 F.3d at 1030). A strict reading of Article 25 does not require such a lengthy journey. Article 25 does not call for wholesale application of the law of the forum, but merely borrows and incorporates by reference one small and discrete piece of the forum's jurisprudence—its definition of wilful misconduct or such default as "is considered to be equivalent to willful misconduct". When that definition is incorporated within Article 25(2), there is no longer any need to "pass through" the Convention to determine the basis for recovery under a different law because the Convention itself adequately defines the basis for recovery.

American courts prior to *Brink's* have successfully done this, applying a uniform American law definition of "wilful misconduct". As stated by Second Circuit in *In re Air Dis-*

aster at Lockerbie, Scotland on December 21, 1988, 37 F.3d 804, 812 (2d Cir. 1994) (*Lockerbie II*), *cert. denied sub nom., Pan Am. World Airways v. Pagnucco*, 115 S.Ct. 934, 130 L.Ed 2d 880 (1995):

> Wilful misconduct under the Convention means that a carrier must have acted either 1) with knowledge that its actions would probably result in injury or death, or 2) in conscious or reckless disregard of the fact that death or injury would be the probable consequences of its actions.

Accord In re Korean Air Lines, 932 F.2d 1475 (D.C. Cir. 1991), *cert. denied, Dooley v. Korean Air Lines*, 502 U.S. 994, 112 S. Ct. 616, 116 L. Ed. 2d 638 (1991).

No court prior to *Brink's* ever took into account the forum's choice of law rules, or even looked to the substantive law of the foreign country where the accident occurred, to the law of the home country of a foreign airline, or to the citizenship of the injured passengers to define wilful misconduct. Except for the *Brink's* decision, all determinations of "wilful misconduct" or "such default as . . . is considered to be equivalent to wilful misconduct", were made only by applying the American definition of "wilful misconduct", without any consideration of whether conflict of law principles would otherwise mandate the application of foreign substantive law.

For example, in *KLM Royal Dutch Airlines v. Tuller*, 292 F.2d 775 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 921 (1961), the Court of Appeals affirmed the jury's finding that an airline had engaged in "wilful misconduct" because, among other reasons, the crew had failed to properly instruct the passengers of the location of life vests and their use. While the Court of Appeals noted that regulations of the Irish Government did not require an airline to give instructions about the use and location of life vests unless a flight is more than 30 minutes travel time from land and that the crash occurred only seconds after the plane left the airport at Shannon, Ireland, no consideration was given as to whether or not the forum's choice of law principles should be taken into account

in deciding whether KLM was guilty of "wilful misconduct" which caused the death of a passenger in Ireland.

In other airline crash cases occurring in other countries or on foreign airlines, American courts uniformly have applied the American definition of "wilful misconduct", without any consideration as to whether choice of law principles should be applied. *E.g., Air Disaster at Lockerbie Scotland, supra*; *In re Korean Air Lines, supra*, 932 F.2d at 1479; *Ospina v. Trans World Airlines*, 975 F.2d 35 (2d Cir. 1992), *cert. denied sub nom., Estate of Ospina By Coughlin v. Trans World Airlines*, 507 U.S. 1051, 113 S.Ct. 1944, 123 L. Ed. 2d 650 (1993); *Pekelis v. Transcontinental & Western Air*, 187 F.2d 122 (2d Cir. 1951), *cert. denied*, 341 U.S. 951, 71 S. Ct. 1020, 95 L. Ed. 1374 (1951).

Furthermore, in the area of cargo loss, the cases prior to the Court of Appeals decision in *Brink's* made determinations of "wilful misconduct" under Article 25 by applying the standard American definition, without consideration of choice of law issues. See, *e.g., Republic Nat. Bank of New York v. Eastern Airlines*, 815 F.2d 232 (2d Cir. 1987) (liability limited to $634 despite disappearance of $2 million in cash during flight from Miami to Peru because plaintiff failed to establish "wilful misconduct" under standard American law definition); *Bank of Nova Scotia v. Pan American World Airways* 16 Avi. ¶17,378, (S.D.N.Y. 1981) (American law of wilful misconduct applied with respect to the theft of a shipment of gold sent by a Canadian bank which disappeared during a flight from Guatemala to San Salvador); *Delgado v. Pan Am. World Airways*, 16 Avi. ¶18,463 (P.R. Sup. Ct. 1982) (applying American definition of "wilful misconduct" in holding that recovery for a loss of thirty kilograms of personal belongings removed from luggage somewhere in flight from Buenos Aires to Caracas and on to Puerto Rico).

Similarly, Article 21 of the Convention states:

> If the carrier proves that the damage was caused or contributed to by the negligence of the injured person the

> Court may, *in accordance with the provisions of its own law*, exonerate the carrier wholly or partly from his liability.

(emphasis added).

Federal courts have applied the substantive law of the forum without taking into account choice of law considerations even where the allegedly contributing negligent plaintiff was injured abroad. *See, e.g., Williams v. Fidelity & Cas. Co. of New York*, 442 F. Supp. 455 (E.D. La., 1977) (Louisiana law of contributory negligence applied where plaintiff slipped during disembarkation from an airplane in Germany).

Accord Miller, *Liability in International Air Transport, supra*, at p.169.

II. The Analysis Adopted by the Court of Appeals Forces Courts To Speculate Where the Wilful Misconduct Occurred Before Hearing The Evidence

The analysis set forth by the Court of Appeals presents serious practical problems. The Court of Appeals acknowledged that New York choice of law rules governing either tort or contract claims could be applied in cases involving cargo losses under the Warsaw Convention. (93 F.3d at 1031). The Court declined to decide whether to apply tort or contract rules in this case, finding either analysis would result in application of South African law. *Id.* Under a torts analysis, however, the Court conceded that "the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders." *Id. quoting Cooney v. Osgood Machinery, Inc.*, 81 N.Y.2d 66, 72, 595 N.Y.S.2d 919, 922, 612 N.E.2d 277, 280 (1993). Using this analysis, the Court found that under Brink's "totality of the circumstances" theory of wilful misconduct, the majority of the SAA employees' actions in question would have occurred in South Africa, and therefore South African law would apply. (93 F.3d at 1032). The Court did this despite SAA's vigorous objection that this was merely Brink's allegation, and that there was no proof where and how this cargo disappeared.

Because of the very nature of cases involving international transportation, the cause of the loss is frequently in dispute and the possible locations of the actions contributing to the loss tend to range over a number of countries. *See, e.g., Air Disaster at Lockerbie Scotland, supra*; *Rymanowski v. Pan Am, supra*; *Perera Co. v. Varig Brazilian Airlines*, 775 F.2d 21 (2d Cir. 1985). Where and how the loss occurred is often the ultimate issue in the case and can only be determined after all the evidence has been heard.

The approach imposed by the Court of Appeals, however, would require a court hearing such a case to play "armchair detective" and speculate where the activities causing the loss probably occurred so as to determine which forum's law to apply.

Since New York's JFK airport is the major international air carrier hub on the eastern seaboard, the erroneous decision of the Court of Appeals, unless reversed by this Court, will have a profound impact on all future Warsaw Convention cases. The precious metal cargo in this case, or lost or stolen cargos in future cases, could just as easily have been on board an airplane which made multiple stops, through several foreign countries, or could have been transferred from one carrier to another carrier en route. As the complexity of intercarrier transportation around the world increases, so does the guesswork forced upon the court.

If the court guesses wrong, the result could be the application of the law of a forum that has little or no connection with the claim. This is not a sound and rational basis for carrying out the Convention's instruction for limited application of the forum jurisdiction's law because, as discussed below, it further destabilizes the Convention's goals of predictability and uniformity—goals which the drafters of Article 25 expressed through those other provisions which instruct that the "applicable law of the forum be applied in order to obtain predictability and uniformity."

III. This Court Has Long Recognized the Convention's Objective Of A Uniform Limitation of Liability Rule For Lost Cargo

This Court addressed the cargo limitation of liability provisions of Article 22 of the Convention in *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 104 S. Ct. 1776, 80 L.Ed. 2d 273 (1984). That decision considered the impact of America's departure in the early 1970 from $35/per ounce official domestic price of gold established in 1934. Specifically, this Court overturned a decision of the Second Circuit which had held that the 1978 repeal of the Par Value Modification Act rendered the Convention's cargo liability limit unenforceable in the United States. In so doing, the Court pointed out:

> The Convention's first and most obvious purpose was to set some limit on a carrier's liability for lost cargo. . . . The Convention's *second objective was to set a stable, predictable, and internationally uniform limit that would encourage the growth of a fledgling industry.*

466 U.S. at 256, 104 S. Ct. at 1784. (emphasis added).

The Convention's objective "to set a stable, predictable, and internationally uniform limit" will be destroyed if the fifty states' choice of law rules were to be engrafted upon Article 25's simple instruction to use the definition of wilful misconduct used by the forum jurisdiction. Indeed, since many states have changed their conflicts of law rules during the nearly 70 years since the Convention was adopted,[4] the

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[4] In New York State alone, the choice of law rules applicable to tort matters have changed from the rule that substantive rights and liabilities are determinable by the law of the place of the tort (*Poplar v. Bourjois, Inc.*, 298 N.Y. 62, 66, 80 N.E.2d 334, 335-6 (1948)) to a "grouping of contacts" test (*Babcock v. Jackson*, 12 N.Y.2d 473, 481, 240 N.Y.S.2d 743, 749, 191 N.E.2d 279, 283-84 (1963)) to New York's current "interests" analysis—which State has the greater interest in having its law applied. (*Istim, Inc. v. Chemical Bank*, 78 N.Y.2d 342, 575 N.Y.S.2d 796, 581 N.E.2d 1042 (1991)).

Brink's decision has the effect of rewriting the Convention. See, *Rocca v. Thompson*, 223 U.S. 317, 331-332, 32 S. Ct. 207, 210-211, 56 L.Ed. 453 (1912) ("treaties . . . are to be read in the light of the conditions and circumstances existing at the time. They were entered into, with a view to effecting the objects and purposes of the States thereby contracting.").

Instead of "the stable, predictable, and internationally uniform limit" which, as this Court observed in *Franklin Mint*, the drafters of the Convention mandated, the Second Court's opinion here would replace stability, predictability and uniformity with the differing conflict of law rules of fifty forums.

IV. The Second Circuit Misapplied This Court's Decision in *Zicherman v. Korean Air Lines Co.*

In its recent *Zicherman* decision, *supra*, this Court held that since Articles 17 and 24 of the Convention did not specify the type of damages that may be recoverable upon the death of passengers in an airplane that crashes on the high seas, that issue should be resolved by the law of the United States and specifically by the provisions of Death on the High Seas Act ("DOHSA"), 46 U.S.C. A §§ 761 *et seq*. ___ U.S. ___, 116 S. Ct. at 637, 133 L. Ed. 2d at 609. In reaching that conclusion, this Court noted that "both parties agree that if the issue of compensable harm is (as we have determined) unresolved by the Convention itself, it is governed in the present case by the law of the United States." 116 S. Ct. at 635, 133 L. Ed. 2d at 607. The Court then ruled that plaintiffs could not recover for loss of society damages when a crash occurs at sea because such damages are not recoverable under DOHSA. 116 S. Ct. at 636, 133 L. Ed. 2d at 608.

This Court also noted that the Convention did not resolve the questions of who may recover and what compensatory damages they may recover—issues that were left open to "private international law;" it also agreed with all of the expert commentators that "compensable harm is to be determined by domestic law." 116 S. Ct. at 635, 116 L. Ed. 2d at 607. What

this Court specifically did not do is engage in a choice of law inquiry to determine whether the crash of a Korean airliner in the seas near Korea during a flight to Seoul should be governed by anything except American law. While rejecting the Second Circuit's position that the courts should craft a federal common law rule of damages applicable to all suits brought under the Convention, it concluded that since the plane had crashed at sea, the damage issues were governed by the federal DOHSA statute. 116 S. Ct. at 636, 116 L. Ed. 2d at 607-608.

In *Zicherman*, this Court was forced to defer to a body of law totally outside the Warsaw Convention because the Convention was clearly silent on a particular issue concerning measure of damages. The same analysis cannot be applied to the instant case in which Article 25 both addresses and resolves the burden of proof a plaintiff bears to obtain damages in excess of the limits set forth in Article 22(2). Article 25 merely incorporates by reference the definition of "wilful misconduct" or "such default as . . . is considered to be equivalent to wilful misconduct" used by the forum jurisdiction; it is not a "gap" in the Convention requiring application of a different body of law, as was the situation in *Zicherman*. The Court of Appeal's wholesale deferral to New York law, including its conflicts of law rules, to determine liability was therefore unnecessary and in derogation of the plain language of the Convention.

The Court of Appeal's decision in *Brink's* turns *Zicherman* and all prior American case law on its head by concluding that determination of wilful misconduct "in accordance with the law of the court to which the case is submitted" should not be made in accordance with American or other domestic laws, but instead should be determined in accordance with the law of South Africa. (A. 18a-20a, 93 F.3d at 1031-32). However, the Court of Appeals acknowledged early in its opinion that "the law of the United States determines what conduct will deprive an air carrier of limited liability protection." (A. 13a; 93 F.3d at 1029.) The analysis applied by

the Court of Appeals in this case may only make sense in situations where it is unclear which *state's* law should act as the stand-in for United States law; using the analysis to reach the conclusion that the law of a foreign country effectively becomes the law of the United States is on its face an inappropriate result, and further points to the logical flaws of the interpretation of Article 25 endorsed by the Court of Appeals.

CONCLUSION

For the foregoing reasons, South African Airways respectfully requests that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
December 17, 1996

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1172—August Term, 1995

(Argued May 15, 1996 Decided August 8, 1996)

Docket No. 95-7872

BRINK'S LIMITED,

Plaintiff-Appellant,

—v.—

SOUTH AFRICAN AIRWAYS,

Defendant-Appellee.

Before:

LUMBARD, MESKILL and MINER,

Circuit Judges.

Plaintiff-appellant Brink's Limited appeals from a judgment of the United States District Court for the Southern District of New York, Baer, *J*., granting defendant-appellee South African Airways' motion for partial

summary judgment and entering judgment against South African Airways in the amount of $1,522. We conclude that the district court erred in applying New York law under Article 25 of the Convention for Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. 876 (1934), *reprinted in* note following 49 U.S.C.A. § 1502 (the "Warsaw Convention"). We also conclude that the district court erred in its application of Articles 8 and 9 of the Warsaw Convention, but nevertheless reached the proper conclusion as to liability under those articles. Therefore, the judgment of the district court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

CRAIG S. ENGLISH, New York City (Thomas C. Murphy, Kennedy Lillis Schmidt & English, New York City, of counsel), *for Appellant.*

MICHAEL I. VERDE, New York City (Franklin F. Bass, Kathleen E. Schaaf, Rosenman & Colin, New York City, of counsel), *for Appellees.*

Stephen J. Fearon, Michael J. Holland, Katherine B. Posner, Robert J. Saville, Condon & Forsyth, New York City, *for Amicus Curiae Qantas Airways Limited* and *Finnair OY.*

MESKILL, *Circuit Judge*:

Plaintiff-appellant Brink's Limited (Brink's) appeals from a decision of the United States District Court for the Southern District of New York, Baer, *J.*, granting defendant-appellee South African Airways' motion for partial summary judgment and entering judgment against South African Airways (SAA) in the amount of $1,522. We conclude that the district court erred in applying New York law under Article 25 of the Convention for Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. 876 (1934), reprinted in note following 49 U.S.C.A. § 1502 (the "Warsaw Convention" or the "Convention"). We also conclude that the district court erred in its application of Articles 8 and 9 of the Warsaw Convention, but nevertheless reached the proper conclusion as to liability under those articles. Therefore, the judgment of the district court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

BACKGROUND

Extensive discovery produced the following background information. Defendant-appellee SAA is a division of Transnet Limited, which is wholly owned by the government of the Republic of South Africa. Rustenberg Platinum Mines Limited (Rustenberg) contracted for SAA to transport certain precious metals by air from Johannesburg to New York under an air waybill[1] dated

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[1] An air waybill is a written document describing the shipping arrangement between the air carrier and the shipper. It includes, *inter alia*, the point of origin and destination and a description of the goods included in the shipment. *See* Warsaw Convention, Arts. 5-16; *see also* Black's Law Dictionary 1593 (6th ed. 1990).

September 10, 1992. Rustenberg also contracted for plaintiff-appellant Brink's to provide security for the shipment and to indemnify Rustenberg for any losses. As consignee under the SAA-Rustenberg air waybill, Brink's commenced this action against SAA, contending that six boxes of the shipment were stolen while in the custody of SAA.[2]

On September 10, 1992, Rustenberg loaded an armored car with the shipment of precious metals bound for New York, London and another refinery within South Africa. At approximately 1:10 p.m., the armored car arrived at the high value cargo vault located within the SAA cargo facility at Jan Smuts Airport in Johannesburg. There, an SAA employee unloaded the shipment under the watch of the armored car driver and the South African Police (SAP), which acted as security for SAA.

Thirty-four boxes were counted by the courier for the shipment (General Malan), the SAP officer assigned to the vault (Sergeant Engelbrecht), the vault foreman, another SAP officer and an employee of the freight forwarding company. Thereafter, the boxes were marked with air waybill labels and placed in an all-metal container, designated AVE 1617, bound for New York.

After padlocks were affixed to the container, Sergeant Engelbrecht, who had previously complained to SAA regarding poor locking mechanisms on the containers used for high value shipments, noticed that despite the padlock, the door to AVE 1617 still could be opened. He informed General Malan of the problem and requested the vault foreman to provide a container that could be locked. The vault foreman advised him that no other

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[2] Article 13(3) authorizes the consignee "to put into force against the carrier the rights which flow from the contract of transportation." Warsaw Convention, Art. 13(3).

containers were available. Thereafter, SAP and SAA personnel closed and locked the high value cargo vault.

At approximately 6:15 that evening, SAA personnel opened the vault, removed container AVE 1617, loaded it on a dolly and transported it from the cargo facility to SAA Flight 201, destined for New York. An armed SAP escort, including General Malan, accompanied the container. After arrival at the aircraft, General Malan, allegedly in contravention of SAA procedures, returned to the passenger lounge. After General Malan's departure, only one security officer, Constable Ramoroka, remained planeside to guard the shipment.

Constable Ramoroka had been guarding a gate at the airport when he was directed to act as the armed guard at the aircraft. He had never guarded a high value shipment on the ramp or at planeside, and was not at all familiar with the contents or appearance of this shipment.

SAA cargo loaders Jose Rheeder and Richard Capkey loaded the shipment on board. Except for a two-to-three minute interval, SAA loadmaster Scholtz Potgeiter supervised the loading process. After container AVE 1617 was loaded into the hold, Constable Ramoroka positioned himself under the wing of the aircraft where he allegedly could not see the stowage location of the container. It took 20 to 60 minutes to load the remaining cargo into the hold. Then container AVE 1617 was "buried" in the hold.

The aircraft departed Jan Smuts Airport at 8:08 p.m. It stopped for a regularly scheduled refueling at Ilha Do Sal in the Cape Verde Islands.[3] Although cargo was

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[3] Although the air waybill did not identify Ilha Do Sal specifically in the "Routing and destination" space, the reverse side of the air waybill provided, in part:

(footnote continued)

removed from the front holds in Ilha Do Sal, no cargo was removed from the hold containing AVE 1617. Except for a two-to-three minute period, General Malan continuously observed the hatch to that hold and verified that it was not opened.

The aircraft arrived at John F. Kennedy International Airport at approximately 6:30 the following morning. SAA security personnel met the aircraft, obtained the padlock keys from General Malan, and proceeded ramp-side, where the hold containing AVE 1617 had been opened but not off-loaded. The SAA personnel observed the off-loading of AVE 1617 and confirmed that the locks and seals were intact. Both the SAA personnel and Port Authority police escorted the container to a cargo facility, where Brink's personnel opened the container and immediately determined that six boxes of the precious metals, worth $1,789,012.67, were missing from the shipment.

The Port Authority police, SAA and the Gold and Diamond Branch of the SAP have investigated the disappearance of the five boxes. Despite an apparently thorough investigation, there have been no arrests or convictions and the boxes have not been recovered. Although SAP bulletins posted an award to refiners handling similar materials, no sale or attempted sale was ever reported. Under its agreement with Rustenberg, Brink's indemnified Rustenberg for the entire loss.

The agreed stopping places (which may be altered by Carrier in case of necessity) are those places, except the place of departure and the place of destination, set forth on the face hereof or shown in Carrier's timetables as scheduled stopping places for the route.

Brink's concedes that the pertinent SAA timetable lists a stopover in the Cape Verde Islands.

In the proceedings below, Brink's sought to impose liability for the entire loss on SAA. SAA admitted only limited liability, and moved for partial summary judgment to the extent that Brink's sought damages above the liability limitation imposed by Article 22(2) of the Warsaw Convention. The district court granted partial summary judgment to SAA and entered a final judgment against SAA for $1,522, the limited liability amount. This appeal followed.

DISCUSSION

This case is governed by the Warsaw Convention and the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (FSIA).[4] The Warsaw Convention provides the cause of action, *see* Warsaw Convention, Arts. 13(3) & 18, but the FSIA provides the sole basis of federal court jurisdiction, *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989). We apply the Warsaw Convention and the FSIA concurrently. *Harris* v. *Polskie Linie Lotnicze*, 820 F.2d 1000, 1002 (9th Cir. 1987). We have appellate jurisdiction under 28 U.S.C. § 1291.

Brink's contends that SAA is liable for the full value of the missing cargo under three theories of liability. First, Brink's contends that the wilful misconduct of SAA employees, in stealing the boxes, deprives SAA of limited liability under Article 25 of the Convention.

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[4] The FSIA confers jurisdiction over foreign states. *See* 28 U.S.C. § 1330 (granting jurisdiction over certain claims against foreign states). Because SAA is an instrumentality of the government of South Africa, or a separate legal entity owned by the Republic of South Africa and not a citizen of the United States, SAA is a foreign state within the meaning of the FSIA. 28 U.S.C. § 1603(b). The FSIA therefore applies to this dispute.

Second, Brink's contends that even absent theft, the conduct of SAA employees constitutes wilful misconduct under the totality of the circumstances and deprives SAA of limited liability under Article 25 of the Convention. Third, Brink's contends that SAA's failure to comply with the requirements of Article 8 of the Convention regarding air waybills also deprives SAA of limited liability under Article 9 of the Convention.

SAA's response is threefold. First, SAA contends that the evidence is insufficient to support the allegation of theft by SAA employees and that even if theft could be proven, employee theft is not wilful misconduct within the meaning of Article 25. Second, SAA contends that Brink's' "totality of the circumstances" claim is not sufficient to create an inference of wilful misconduct. Finally, SAA contends that its incorporation of certain information by reference to documents outside the air waybill satisfied the requirements of Article 8 of the Convention.

Our interpretation of the Warsaw Convention must begin "with the literal language." *Buonocore* v. *Trans World Airlines*, 900 F.2d 8, 9 (2d Cir. 1990). If the language is "reasonably susceptible of only one interpretation," our task of interpretation ends there. *Id.* at 9-10; *see also Victoria Sales Corp.* v. *Emery Air Freight*, 917 F.2d 705, 707 (2d Cir. 1990) (stating that "when the text of a treaty is clear, a court shall not, through interpretation, alter or amend the treaty" (citing *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989))). We may apply secondary tools of interpretation only when the treaty text is ambiguous. *Chan*, 490 U.S. at 134.

I. *Wilful Misconduct*

This appeal requires us to determine whether Article 25 of the Warsaw Convention—which deprives a carrier of limited liability for damage caused by its "dol," as the original French text provides, or by its "wilful misconduct," as the English translation provides—embraces an international standard of conduct or defers to the law of the forum jurisdiction for its definition of wilful misconduct. If Article 25 defers to the law of the forum jurisdiction, in this case the United States, we must determine whether a federal statute, federal common law or state law governs this controversy. We then must apply the appropriate choice of law rules and determine what law, in fact, defines the content of wilful misconduct.

A. *The "law of the court to which the case is submitted"*

Article 18 of the Warsaw Convention presumes an air carrier liable for loss or damage to goods in transit, but Article 22(2) limits that liability to 250 francs per kilogram, or approximately $9.07 per pound. Warsaw Convention, Arts. 18, 22(2). However, under Article 25(1) and (2), the Convention eliminates the limitation of liability where the wilful misconduct of the carrier causes the loss or damage. *Id.*, Art. 25(1) & (2). Under that Article, a complaining party must prove both wilful misconduct and proximate cause in order to avoid the general rule of limited liability.

Specifically, Article 25, as translated, states:

> (1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused

> by his wilful misconduct or by such default on his part as, *in accordance with the law of the court to which the case is submitted*, is considered to be equivalent to wilful misconduct.
>
> (2) *Similarly* the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

Id., Art. 25(1) & (2) (emphases added). Thus, Article 25(2) makes it clear that an air carrier is liable for the wilful misconduct of its employees acting within the scope of their employment. More pertinently, Article 25(1) makes it clear that wilful misconduct must be defined "in accordance with the law of the court to which the case is submitted." *Id.*, Art. 25(1).

The language of Article 25(1), adopted in subsection (2) by use of the word "similarly," is clear. The only reasonable interpretation of the reference to "the law of the court to which the case is submitted" is as a reference to the law of the forum jurisdiction. More importantly, the only reasonable construction of Article 25's reference to the law of the forum jurisdiction is deference to that law for the purposes of defining "dol" or "wilful misconduct." In other words, Article 25 unambiguously deprives an air carrier of limited liability for damage caused by its "dol," or that which is "considered to be equivalent" to "dol," interpreted as "wilful misconduct," under the law of the forum jurisdiction. *Id.*, Art. 25(1).

Because we conclude that the language of Article 25(1) clearly calls for the application of the law of the forum jurisdiction, we must reject the "international"

interpretation of Article 25 advanced by Brink's. In other words, because Article 25(1) unambiguously defers to the law of the forum jurisdiction for the *content* of "wilful misconduct," we must reject any notion that this language is merely a reference to local terminology or, as Brink's describes it, a vehicle for translating the difficult civil concept of "dol."

Although we recognize that the term "dol," or "wilful misconduct," as we have translated it, is a civil law concept, and one that is not readily capable of translation, the conflict over the content of "wilful misconduct" arises out of conflicting policies, not difficulty of translation. *Compare Rustenberg Platinum Mines, Ltd.* v. *South African Airways*, [1979] 1 Lloyd's Rep. 19, 23 (Eng. C.A.) (concluding that an employee who commits theft while carrying out functions entrusted to him is acting within the scope of his employment), *with Rymanowski* v. *Pan Am. World Airways*, 70 A.D.2d 738, 739, 416 N.Y.S.2d 1018, 1020 (3d Dep't 1979) (concluding that an employee who commits theft is not acting within the scope of his employment because acts such as theft are not committed in furtherance of the employee's duties), *aff'd*, 49 N.Y.2d 834, 427 N.Y.S.2d 795, 404 N.E.2d 1336 (1980). In other words, we believe that the drafters of the Convention recognized the possibility of conflicting national policies with respect to imputing liability to a carrier, but unmistakably resolved any conflict by deferring to the law of the forum jurisdiction.

Even were we to ignore the plain language of Article 25 and conclude that the difficulty of interpreting the term "dol" alone justified resort to interpretive techniques, traditional interpretive techniques do not support the concept of an international standard advanced by

Brink's. First, the participants at the Warsaw Convention were not ignorant of the widely divergent laws governing liability for the acts of servants. As one scholar relied upon by Brink's noted, the participants to the Convention appreciated the difficulty of determining what acts should be imputed to a carrier but did not draw any lines. H. Drion, *Limitation of Liabilities in International Air Law* ¶¶ 205-206, at 248 (1954).

Second, the minutes of the Warsaw Convention offer "little guidance" on the ultimate question presented here—the liability of an employer for the acts of an employee. *Id.* ¶ 206. Third, the international authorities cited by Brink's similarly offer little guidance to American courts. Although these authorities universally conclude that theft by an employee must be imputed to the employer for purposes of liability, they do not address the question of which body of law governs under Article 25, presumably because no real conflict arose in those cases. *See, e.g., Rustenberg Platinum Mines, Ltd.* v. *South African Airways*, [1979] 1 Lloyd's Rep. 19, 23 (Eng. C.A.) (concluding that English courts share view generally accepted in other countries that a master is liable for the acts committed by a servant in the course of carrying out the duties entrusted to him). Finally, although the participants to the Warsaw Convention desired uniformity, and although the opinions of sister signatories are entitled to considerable weight, *Air France* v. *Saks*, 470 U.S. 392, 404 (1985) (quoting *Benjamins* v. *British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979)), the participants in the Convention recognized that uniformity was not always possible, and thus, envisioned application of local law to certain questions. *See Zicherman* v. *Korean Air Lines Co., Ltd.*, 116 S.Ct. 629, 635

(1996) (noting incontrovertible application of national law to certain issues and infeasibility of uniformity under Article 24).

In short, the literal language of Article 25 refers to the law of the forum jurisdiction for a determination of what conduct constitutes wilful misconduct by an air carrier. Moreover, even traditional interpretive techniques, foreclosed by the clarity of Article 25, would not produce a definitive, let alone contrary, interpretation of Article 25. Thus, the law of the United States determines what conduct will deprive an air carrier of limited liability protection.

B. *United States Law for Purposes of Article 25*

The next question we must answer is *what* is the law of the United States for purposes of Article 25. The United States Congress has not enacted any legislation addressing the precise issue here. Thus, the question becomes whether the courts of the United States should develop and apply federal common law or whether state law provides a governing rule. In making this determination, we are mindful that the Supreme Court recently admonished lower courts to refrain from developing federal common law "under cover" of advancing the goal of uniformity in Warsaw Convention cases. *See Zicherman*, 116 S.Ct. at 636.

In *Zicherman*, the Supreme Court interpreted Article 24 of the Convention as leaving the question of available remedies unresolved. *Id.* at 635. The Court held that Article 24 defers to private international law for resolution of those questions. *Id.* More specifically, the Court characterized Article 24 as a "pass-through," directing courts to apply the law that would govern in the absence of the Warsaw Convention. *Id.* at 636. In

Zicherman, a federal statute (the Death on the High Seas Act) supplied the rule of law. *Id.* at 636.

More pertinently, the *Zicherman* Court reversed this Court's holding that federal common law, specifically general maritime law, governed such causes of action. *Id.* at 636 (*rev'g Zicherman* v. *Korean Air Lines Co., Ltd.*, 43 F.3d 18, 21 (2d Cir. 1994) (following *In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988*, 928 F.2d 1267 (2d Cir.), *cert. denied*, 502 U.S. 920 (1991), & *In re Air Disaster at Lockerbie Scotland on Dec. 21, 1988*, 37 F.3d 804 (2d Cir. 1994), *cert. denied*, 115 S.Ct. 934 (1995))). The Court cautioned that, notwithstanding any desire for uniformity, the Warsaw Convention does not empower United States federal courts "to develop some common-law rule—under cover of general admiralty law or otherwise—that will supersede the normal federal disposition." *Zicherman*, 116 S.Ct. at 636.

Thus, the Warsaw Convention does not authorize creation of an international or federal common law "in derogation of otherwise applicable law." *Id.* Rather, where the drafters declined to enact a substantive rule of law within the Convention, the Convention merely acts as a "pass-through," directing courts to apply the law that would govern in the absence of the Warsaw Convention. *Id.* Accordingly, we refrain from fashioning a federal common law rule in this case.

In the ordinary diversity case, federal courts would apply the law of the forum in which the court is located. *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938). In this case, however, the FSIA provides the sole basis of federal court jurisdiction. *Argentine Republic*, 488 U.S. at 443. Nevertheless, state law generally controls in FSIA cases as well. *Barkanic* v. *General Admin. of Civil*

Aviation of the People's Republic of China, 923 F.2d 957, 959 (2d Cir. 1991). More specifically, "where state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances." *First Nat'l City Bank* v. *Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 622 n.11 (1983).

Here, an international treaty governs liability between the parties to this lawsuit. However, that treaty defers to the law of the United States. Thus, we "pass-through" the Warsaw Convention to United States law and, under the FSIA, to state law for the rule of liability governing this dispute. *See Zicherman*, 116 S.Ct. at 636 (suggesting that where Warsaw Convention does not supply a rule of law, the Warsaw Convention acts as a "pass-through" to otherwise applicable law); *First Nat'l City Bank*, 462 U.S. at 622 n.11 (concluding that the FSIA requires application of state law if state law provides a rule of liability).

In short, Article 25 of the Warsaw Convention defers to the law of the forum jurisdiction for a determination of what conduct constitutes "wilful misconduct" by an air carrier. When a Warsaw Convention action is filed in a United States district court and no federal statute governs, the law of the United States for purposes of Article 25 is the law of the state in which the district court sits.

In applying the law of the forum jurisdiction, federal courts must also apply that state's choice of law rules. *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (involving diversity case); *see also Zicherman*, 116 S.Ct. at 635 (noting that, in determining which *sovereign's* law applies, "[c]hoice of law is, of course, determined by the forum jurisdiction"); *Barkanic*, 923

F.2d at 961 (holding that the FSIA incorporates state choice of law rules). *But see Bickel* v. *Korean Air Lines Co., Ltd.*, 83 F.3d 127, 130-31 (6th Cir. 1996) (developing and applying a federal choice of law rule to Article 24 of the Warsaw Convention). Because this action was instituted in the United States District Court for the Southern District of New York, New York law, including New York choice of law rules, controls.

C. *Choice of Law*

The next question for us is what law New York state courts would apply to the issue in dispute. We need not determine which particular New York choice of law rule, tort or contract, applies in this context because we conclude that New York state courts would apply South African law under either choice of law analysis.

Until the latter part of this century, New York courts employed a "traditional, 'territorially oriented' approach to choice-of-law issues which applied the law of the geographical place where one key event occurred, such as the place of the wrong in tort cases or where an agreement was entered into or performed in contract cases." *Istim, Inc.* v. *Chemical Bank*, 78 N.Y.2d 342, 347, 575 N.Y.S.2d 796, 798, 581 N.E.2d 1042, 1044 (1991). More recently, however, New York courts, recognizing that "[a] State may lack sufficient nexus with a case so that choice of its law is arbitrary or fundamentally unfair," abandoned these rigid rules in favor of a more flexible approach. *Cooney* v. *Osgood Mach., Inc.*, 81 N.Y.2d 66, 70-71, 595 N.Y.S.2d 919, 921, 612 N.E.2d 277, 279 (1993). Under this more flexible approach, New York courts seek to apply the law of the jurisdiction with the most significant interest in, or relationship to, the dis-

pute. *Babcock* v. *Jackson*, 12 N.Y.2d 473, 481-82, 240 N.Y.S.2d 743, 749, 191 N.E.2d 279, 283-84 (1963).

In contract cases, New York courts now apply a "center of gravity" or "grouping of contacts" approach. *Id.* Under this approach, courts may consider a spectrum of significant contacts, including the place of contracting, the places of negotiation and performance, the location of the subject matter, and the domicile or place of business of the contracting parties. *In re Allstate Ins. Co. and Stolarz*, 81 N.Y.2d 219, 227, 597 N.Y.S.2d 904, 908, 613 N.E.2d 936, 940 (1993). New York courts may also consider public policy "where the policies underlying conflicting laws in a contract dispute are readily identifiable and reflect strong governmental interests." *Id.* at 226, 579 N.Y.S.2d at 907, 613 N.E.2d at 939. The traditional choice of law factors, the places of contracting and performance, are given the heaviest weight in this analysis. *Id.*

In tort cases, New York courts apply an "interests" analysis. *Istim, Inc.*, 78 N.Y.2d at 347-48, 575 N.Y.S.2d at 798, 581 N.E.2d at 1044. Courts must examine the purposes and policies of the conflicting laws in the context of the facts of the case. "If conflicting conduct-regulating laws are at issue, the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders." *Cooney*, 81 N.Y.2d at 72, 595 N.Y.S.2d at 922, 612 N.E.2d at 280. If post-event remedial rules, or loss-allocating rules, are at issue, "other factors are taken into consideration, chiefly the parties' domiciles." *Id.* In short, "interests analysis" determines "which State has the greater interest in having its law applied." *Istim, Inc.*, 78 N.Y.2d at 348, 575 N.Y.S.2d at 798, 581 N.E.2d at 1044.

When choice of law analysis calls for application of foreign law which would " 'violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal' . . . , the court may refuse to enforce it." *Cooney*, 81 N.Y.2d at 78, 595 N.Y.S.2d at 926, 612 N.E.2d at 284 (quoting *Loucks* v. *Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918)). However, not all New York statutes or cases express fundamental public policy. *Id.* at 79, 595 N.Y.S.2d at 926, 612 N.E.2d at 284. "[R]esort to the public policy exception should be reserved for those foreign laws that are truly obnoxious." *Id.* at 79, 595 N.Y.S.2d at 927, 612 N.E.2d at 285. More pertinently, this exception applies "only when New York's nexus with the case is substantial enough [that applying the foreign law would] threaten [New York] public policy." *Id.* at 78, 595 N.Y.S.2d at 926, 612 N.E.2d at 284.

This case, essentially an action for indemnification, arises from a contract for carriage of goods between a shipper and an air carrier. The Warsaw Convention, an international treaty governing the liability of air carriers, provides the cause of action. That treaty deprives an air carrier of its limited liability protection for damage caused by the wilful misconduct of its employees. However, that treaty refers to the law of the forum jurisdiction for a determination of whether theft by an employee acting within the scope of employment constitutes wilful misconduct by the air carrier.

We need not decide whether this context requires application of contract choice of law principles or tort choice of law principles, or, assuming the latter, whether the applicable law is one of conduct regulation or loss allocation. Under any analysis, the Republic of South

Africa clearly is the center of gravity of this dispute, *Allstate Ins.*, 81 N.Y.2d at 227, 597 N.Y.S.2d at 908, 613 N.E.2d at 940, and has the greatest interest in having its law applied to this controversy, *Istim, Inc.*, 78 N.Y.2d at 348, 575 N.Y.S.2d at 798, 581 N.E.2d at 1044.

Brink's, the plaintiff and the intended consignee under the contract of carriage, is a British company with a satellite office in New Canaan, Connecticut. SAA is a South African corporation with a local New York office. SAA, as noted, is also an instrumentality of the South African government. South Africa was the place of contracting[5] and the primary place of performance.[6] Thus, while the Republic of South Africa is closely associated to the contract of carriage, New York is not associated with that contract at all.

With respect to Brink's' claim of theft, Brink's' theory is that SAA employees stole the goods in South Africa. With respect to Brink's' claim that the wilful misconduct of SAA's employees, under the totality of the circumstances, caused the loss to occur, all of the actions which form the basis of this claim likely occurred in South Africa. In other words, if any misconduct occurred at all, it likely occurred in South Africa. The Republic of South Africa certainly has a greater interest than New York in

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5 Brink's seeks to recover as the consignee of the goods which were the subject of the contract of carriage between SAA and Rustenberg, another South African concern. In the absence of any contrary indication, we presume that these two South African concerns formed their contract in South Africa.

6 SAA was responsible for transporting the Rustenberg precious metals from Jan Smuts Airport to John F. Kennedy International Airport without loss or damage. The bulk of SAA's work with respect to the Rustenberg cargo was guarding the cargo before loading, during loading, and after loading until take-off.

the alleged wilful misconduct or gross negligence of SAA, an instrumentality of its government, and the SAP.

SAA is the only party on this record with any relationship to New York, and that is only through a local SAA office. The discovery at Kennedy Airport, that several boxes of cargo were missing, is the only contact New York has had with this dispute, and that contact is of limited significance. Thus, New York's nexus with this case is not substantial.

In short, all significant relationships and events point toward South Africa as the sovereign with the greatest interest in having its law applied to this controversy. South African law governing employer-employee liability may be in conflict with New York law. However, New York's nexus with this case is not so substantial that application of South African law would threaten public policy as expressed in New York's common law master-servant rule. Moreover, holding SAA liable for employee theft would not be so "obnoxious" to New York public policy. *Cooney*, 81 N.Y.2d at 79, 595 N.Y.S.2d at 927, 612 N.E.2d at 285. Thus, New York choice of law doctrine requires application of South African law to this controversy.

D. *Remand*

In accordance with the foregoing, we conclude that Article 25 of the Warsaw Convention defers to the law of the forum jurisdiction for a determination of what conduct constitutes wilful misconduct by an air carrier. In the United States federal courts, that law is the substantive law of the forum jurisdiction, including the forum's choice of law rules. In this case, New York choice of law rules require application of South African law.

Thus, to the extent that the district court relied on New York master-servant law in granting SAA partial summary judgment, we reverse the judgment of the district court and remand the cause for a determination of liability under South African law. If theft by an employee acting in the course of employment constitutes wilful misconduct by an employer-air carrier under *South African* law, the district court must determine, in accordance with SAA's motion, whether Brink's has set forth sufficient evidence of theft to defeat the motion for summary judgment. Similarly, the district court must determine whether, under *South African* law, Brink's has set forth a colorable claim that the conduct of SAA employees, under the totality of the circumstances, constituted wilful misconduct by SAA. Accordingly, the judgment of the district court is reversed and the cause remanded for further proceedings consistent with this opinion.

II. *The Air Waybill*

The final issue we must decide is whether incorporation by reference satisfies the requirement of Articles 8[7]

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[7] Article 8 provides, in pertinent part:

> The air waybill shall contain the following particulars:
>
> . . . .
>
> (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the transportation of its international character;
>
> . . . .
>
> (e) The name and address of the first carrier;
>
> . . . .
>
> (h) The number of packages, the method of packing, and the particular marks or numbers upon them;

(*footnote continued*)

and 9[8] that an air waybill "contain" certain essential information. Warsaw Convention, Arts. 8 & 9. More specifically, we must determine whether an air waybill that incorporates essential particulars by reference to documents outside the waybill and to statements within the waybill satisfies Articles 8 and 9.

The Warsaw Convention addresses three transportation documents and the "particulars" which must be set forth in each document. The three documents are passenger tickets, baggage checks and air waybills. *See* Warsaw Convention, Chap. II, Sec. I (passenger tickets), Chap. II, Sec. II (baggage checks), Chap. II, Sec. III (air waybills). The consequences for violating a "particular" requirement depend upon which transportation document and which "particular" are involved.

With respect to the air waybill, Article 8 of the Convention requires that the waybill "shall contain" seventeen particulars. Warsaw Convention, Art. 8(a)-(q). Of the seventeen particulars, ten are deemed essential—including the "agreed stopping places" and the "name and address of the first carrier." *Id.*, Art. 8(c) & (e), Art. 9. Under Article 9, if the waybill does not "contain" the essential particulars, the carrier may not avail itself of the Convention's limited liability protection. *Id.*, Art. 9.

(i) The weight, the quantity, the volume, or dimensions of the goods.

Warsaw Convention, Art. 8.

[8] Article 9 provides:

If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8(a) to (i), inclusive, and (q), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability.

Warsaw Convention, Art. 9.

We examined Article 8 and Article 9 of the Convention in *Exim Indus.* v. *Pan Am. World Airways*, 754 F.2d 106, 108 (2d Cir. 1985). In that case, the carrier did not include all of the particulars listed in subsections (h) and (i) of Article 8. We first noted that the text of subsections (h) and (i) was ambiguous because it was not clear whether the text should be read to require one or all of the listed items. *Id.*; *see also* n.7, *supra*. We therefore turned to traditional interpretive techniques and concluded that Article 9 does not deprive a carrier of limited liability where the waybill omits a subsection (h) or (i) particular unless the omission is of practical commercial significance. *Id.*

Parties to litigation before this Court have argued repeatedly that *Chan*, 490 U.S. 122, implicitly overruled *Exim*. Each time, we rejected that argument. *See, e.g.*, *Maritime Ins. Co. Ltd.* v. *Emery Air Freight Corp.*, 983 F.2d 437, 440 (2d Cir. 1993); *Distribuidora Dimsa* v. *Linea Aerea del Cobre S.A.*, 976 F.2d 90, 95-96 (2d Cir. 1992). In both *Maritime Ins.* and *Distribuidora Dimsa*, we explained that *Exim* did not violate the rule invoked in *Chan*—that a treaty should be interpreted according to its plain language—because *Exim* involved ambiguous language. *Maritime Ins.*, 983 F.2d at 440; *Distribuidora Dimsa*, 976 F.2d at 96.

Although we limited *Exim*'s commercial significance approach to subsections (h) and (i), *Maritime Ins.*, 983 F.2d at 440, we did so only because the remaining subsections of Article 8 did not contain the same conjunctive-disjunctive ambiguity. While our language in so limiting *Exim* concededly was broad, we also distinguished between *omissions* and *deviations* in language and explained that Article 9 offers little guidance with respect to deviations. *Id.* We concluded that Article 9

clearly and unambiguously deprives an air carrier of limited liability if its air waybill *omits* any other essential Article 8 particular. *Id.* However, *Maritime Ins.* does not provide that deviations from the literal language of Article 8 *per se* deprive an air carrier of limited liability under Article 9.

We extract three rules from this pertinent body of case law. First, if an air carrier *omits* any of the enumerated particulars of subsections (h) and (i) of Article 8, Article 9 deprives the carrier of limited liability protection if the omitted particular is of commercial significance. *Exim*, 754 F.2d at 108. Second, if an air carrier omits any other essential particular from its air waybill, Article 9 deprives the air carrier of limited liability protection regardless of commercial significance. *Maritime Ins.*, 983 F.2d at 440. Third, if an air waybill includes an essential particular, but deviates in language or some other respect, the question of whether or not Article 9 deprives the air carrier of limited liability may be determined with the assistance of traditional methods of interpretation. *Id.*

In short, the operation of Articles 8 and 9 is relatively clear with respect to *pure omissions*. However, the text of Articles 8 and 9, when considered separately or together, offers little guidance as to the manner in which an air carrier must include the particulars in the air waybill. In other words, Article 9 does not address the consequences of less than strict compliance with, but more than pure omission of, the requirements of Article 8.

Thus, beyond the context of pure omissions, we may consider sources outside of the text to determine whether a particular air waybill satisfies Article 8. Proper sources include the drafting history of the Convention and of the

specific provisions in question, the decisions of other courts interpreting the provisions in question, particularly those of sister signatories to the Convention, and other rules of construction. *See*, *e.g.*, *id.* (stating that "when language is unclear, courts are enjoined to construe treaties more liberally than private agreements"). After considering these sources, we must determine whether the manner of compliance, or the information provided, satisfies the purpose of requiring the specified particular to be included in the waybill.

The dispute in this case centers around subsections (c) and (e) of Article 8. These provisions require an air carrier to include "[t]he agreed stopping places" and "[t]he name and address of the first carrier" within the air waybill. Warsaw Convention, Art. 8(c) & (e).

The SAA-Rustenberg air waybill did not identify Ilha Do Sal as an agreed stopping place in the space provided for routing information. Rather, on the back of the waybill, it included a statement that the agreed stopping places were those shown in the carrier's timetables. *See* n.3, *supra*. With respect to the address of the first carrier, in this case SAA, the reverse side of the waybill contained a statement that "[t]he first Carrier's address is the airport of departure shown on the face" of the waybill. The front of the waybill identified JSA (Jan Smuts Airport) as the airport of departure.

Our task with Article 8(c) requires us to look beyond the plain language of that provision. Because the air waybill does not specifically list the agreed stopping places, we must determine whether reference to an air carrier's timetables satisfies Article 8(c)'s requirement that the waybill "contain" the information. In making this determination, we turn to sources outside of the text itself.

The question posed is one of first impression in this Court, and we have found no other decisions of our sister circuits on point. However, courts of other Warsaw signatory nations have approved of satisfying Article 8(c) by incorporating timetables into the air waybill. *See, e.g., Corocraft Ltd.* v. *Pan Am. World Airways*, [1969] 1 Q.B. 616, 628 (Q.B.D. 1968), *rev'd on other grounds*, [1969] 1 Q.B. 648 (Eng. C.A. 1968) (approving of incorporation of timetables in satisfaction of Article 8(c)).

Lower federal courts and state courts within the United States also have concluded, uniformly, that incorporation by reference to readily available timetables satisfies Article 8(c). *See, e.g., Tai Ping Ins. Co. Ltd.* v. *Northwest Airlines*, 897 F.Supp. 127, 130 (S.D.N.Y. 1995); *Kraus* v. *KLM*, 92 N.Y.S.2d 315, 317 (Sup. Ct. 1949), *aff'd*, 278 A.D. 811, 105 N.Y.S.2d 351 (1st Dep't 1951). The district court adopted this rule.

The purpose of Article 8(c) was to notify shippers of the international character of the transportation and the applicability of the Warsaw Convention. Minutes, Second International Conference on Private International Law, October 4-12, 1929, Warsaw 248-49 (R.C. Horner & D. Legrez trans. 1975) (containing *Report of the International Technical Committee of Aeronautical Legal Experts on the Preliminary Draft of a Convention relating to documents of air carriage by aircraft* ("The particulars *indicating that a document covering international carriage is involved*, that is to say, those provided for under letters (a) through (f), are indispensable." (emphasis added))) [hereinafter "Horner & Legrez"]; K.M. Beaumont, *Need for Revision and Amplification of the Warsaw Convention*, 16 J. of Air L. & Com. 395, 398 (1949); *Tai Ping*, 897 F.Supp. at 130;

American Smelting & Ref. Co. v. *Philippine AirLines*, 4 Av. Cas. (CCH) 17,413, 17,414 (N.Y. Sup. Ct. 1954), *aff'd mem.*, 285 A.D. 1119, 141 N.Y.S.2d 818 (1st Dep't 1955), *aff'd mem.*, 1 N.Y.2d 866, 153 N.Y.S.2d 900, 136 N.E.2d 14 (1956); *Kraus*, 92 N.Y.S.2d at 317; *see also* Dr. Daniel Goedhuis, Nat'l Airlegislations and the Warsaw Convention 148-50 (1937) (referring to passenger tickets). While the point of departure and destination ordinarily would indicate the domestic or international character of the flight, Article 8(c) recognizes the possibility of carriage within one sovereign with a stopover in another sovereign. *See* Horner & Legrez, *supra*, at 247 ("The definition of international carriage was formulated in a broad sense, so that carriage whose point of departure and point of destination are situated in the same State is, nonetheless, considered as international when a stop is contemplated in another State."); Goedhius, *supra*, at 148-50 ("[T]he carriage between Marseilles and Dakar is internal carriage and . . . carriage between Marseilles and Dakar with a stop at Barcelona is international within the meaning of the Warsaw Convention."); Beaumont, *supra*, at 398 ("The object of inserting at least one agreed stopping place is important when carriage between two territories of the same State is involved because, unless there is an *agreed* stopping place in another State, the carriage would not be 'international.' ").

Although Brink's concedes that Article 8(c) was intended to notify shippers of the international character of the flight, Brink's contends that Article 8(c) also was intended to warn shippers of stops where their goods might be placed at risk. Brink's refers to minutes of the Convention, which demonstrate that some participants were concerned about possible seizures of

goods at intermediate stops and therefore desired that Article 8(c) also require inclusion of the route to be followed within the waybill. We note, however, that the participants ultimately declined to include a requirement within subsection (c) that the waybill contain the route to be followed. *See* Horner & Legrez, *supra*, at 158-59. Instead, they included such a requirement within subsection (p), which they adopted as an optional particular. *See* Warsaw Convention, Art. 8(p) & Art. 9. Thus, as far as this record reveals, the purpose of subsection (c) was to provide notice of the international character of the flight.

We believe that incorporation by reference satisfies Article 8(c). An air waybill that refers the shipper to readily available timetables provides sufficient information to notify the shipper of the agreed stopping places, and therefore, of the international or non-international character of the flight. More specifically, the SAA-Rustenberg air waybill, which referred Rustenberg to its published timetables for information regarding stopovers, provided Rustenberg with sufficient information to ascertain the regularly scheduled stopover in the Cape Verde Islands. Thus, the SAA-Rustenberg air waybill satisfies the requirements of Article 8(c), and Article 9 does not operate to deprive SAA of limited liability protection. In this respect, we affirm the judgment of the district court.

Our task with Article 8(e) is an easy one. We need examine only the text of Article 8(e) and the waybill itself to conclude that the waybill "contains" the name and address of the first carrier as required by Article 8(e). Warsaw Convention, Art. 8(e). The reverse side of the waybill unmistakably identifies the airport of departure, shown on the face of the waybill, as the address of

the first carrier. The face of the waybill identifies JSA (Jan Smuts Airport) as the airport of departure. Article 8(e) does not designate any particular section of a waybill or any particular words which must be used to relay the required information. An air waybill that identifies the airport of departure as the address of the first carrier *within the air waybill itself* is sufficient to relay the required information. Thus, the SAA-Rustenberg air waybill satisfies the requirements of Article 8(e), and Article 9 does not operate to deprive SAA of limited liability protection.

The parties apparently did not refer the district court to the language identifying the airport of departure as the address of the first carrier. At least the district court did not mention this language in its opinion, in which it concluded that the waybill did not contain the address. Nevertheless, the district court concluded that this oversight would not deprive SAA of limited liability protection because SAA's address is readily available. Although the district court erred, the error was harmless because the district court reached the proper conclusion as to liability. Thus, in this respect also, we affirm the judgment of the district court.

In short, we conclude that the SAA-Rustenberg air waybill satisfies the requirements of both Article 8(c) and 8(e) and that Article 9 does not deprive SAA of limited liability protection. Our conclusion is consistent with the rule of interpreting ambiguous treaty provisions liberally, as well as with the decisions of both domestic and foreign courts and, thus, fosters the goal of uniformity advanced by the Warsaw Convention.

CONCLUSION

To the extent that the district court granted partial summary judgment to SAA on the basis of New York law regarding employer-employee liability, the judgment is reversed and the cause remanded for further proceedings consistent with this opinion. To the extent that the district court granted partial summary judgment to SAA on the basis that the air waybill satisfied the requirements of Article 8 of the Warsaw Convention, the judgment is affirmed.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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94 Civ. 1902 (HB)

BRINK'S LIMITED,

Plaintiff,

—against—

SOUTH AFRICAN AIRWAYS,

Defendant.

APPEARANCES:

Craig S. English, Thomas Murphy
Kennedy Lillis Schmidt & English
New York, New York, For Plaintiff.

Franklin Bass, Michael Verde
Rosenman & Colin
New York, New York, For Defendant.

Opinion and Order

Harold Baer, Jr., U.S.D.J.

Plaintiff Brink's Limited ("Brink's") brings this action against South African Airways ("SAA"), seeking the full monetary value of six boxes of palladium and rhodium that were allegedly stolen by SAA employees while in transit from South Africa to New York.

SAA now moves for partial summary judgment to the extent that plaintiff's claim seeks damages over and above the

liability limitation imposed by Article 22 of the Convention for Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. (1934), *reprinted in* 49 U.S.C. § 1502 (the "Warsaw Convention"). Brinks contends that the loss was caused by the "wilful misconduct" of SAA and therefore is outside the purview of the Warsaw Convention.

If the liability limitation applies, plaintiff's damages would be limited to approximately $1,520.00. Without the limitation, plaintiff would be entitled to the full value of the lost cargo—approximately $1,789,012.67.

For the reasons that follow, SAA's motion is GRANTED.

I. *Facts*

The following factual recitation includes a summary of only those events necessary to determine this motion. On September 10, 1992, plaintiff sent a shipment containing thirty-two boxes of palladium and two boxes of rhodium from South Africa to New York via SAA Flight 201. Upon arrival at John F. Kennedy International Airport, a Brink's employee discovered that five boxes of palladium and one box of rhodium were missing.

SAA, the Port Authority Police, and the Gold and Diamond Branch of the South African Police each conducted an extensive investigation. As of today, the palladium and rhodium have not been found, nor have the police made any arrests in connection with this incident.

II. *Discussion*

Brink's seeks the full value of its lost cargo. It contends that SAA is not entitled to the limited liability protections afforded to air carriers under the Warsaw Convention because (1) SAA's employees allegedly stole the lost cargo, thus constituting wilful misconduct on the part of SAA; and (2) SAA neglected to include required particulars in its air waybill. Conversely, SAA argues that (1) theft by an employee does not constitute wilful misconduct and therefore does not preclude the liability limitation under the Convention; and (2) its air waybill did not omit required particulars.

A. *Limitation of Liability*

Plaintiff's claim is controlled by the Warsaw Convention, under which an air carrier is strictly liable for loss or damage to goods sustained during international transport. *Republic Nat'l Bank of N.Y v. Eastern Airlines, Inc.*, 815 F.2d 232, 236 (2d Cir. 1987). The air carrier's liability, however, is limited to 250 francs per kilogram, or approximately $9.07 per pound. Warsaw Convention, Art. 22(2); *Williams Dental Co.. Inc. v. Air Express Int'l*, 824 F. Supp. 435, 439 (S.D.N.Y.), *aff'd*, 17 F.3d 392 (2d Cir. 1993). This *quid pro quo* is one of the primary purposes of the Warsaw Convention. *Republic Nat'l Bank of N.Y.*, 815 F.2d at 236; *Royal Ins. v. Amerford Air Cargo*, 654 F. Supp. 679, 684 (S.D.N.Y. 1987).

Article 25 of the Warsaw Convention creates an exception to the Article 22(2) limitation of liability:

> (1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.
>
> (2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

Accordingly, to overcome the liability limitation, plaintiff must plead and prove facts showing (a) that SAA engaged in wilful misconduct, and (b) that this wilful misconduct was the proximate cause of the loss of the six boxes. *Victoria Sales Corp. v. Emery Air Freight, Inc.*, 1989 WL 76227, *4 (S.D.N.Y. July 5, 1989).

SAA contends that theft by an employee cannot be deemed to be an act "within the scope of his employment," as is required under Article 25(2). Therefore, even assuming that plaintiff's allegations are true, SAA did not engage in wilful misconduct and, thus, is entitled to Article 22(2)'s limitation of liability.

In the seminal American case on this issue, *Rymanowski v. Pan American World Airways, Inc.*, 416 N.Y.S.2d 1018 (3d Dep't 1979), *aff'd*, 49 N.Y.2d 834 (1980), plaintiff sued under the Warsaw Convention for damages in excess of Article 22(2)'8 liability limits for the value of his luggage allegedly stolen by defendant's employee. Following New York law, the court held that an employee acts within the scope of his employment " 'when he is doing something in furtherance of the duties he owes to his employer and where the employer is, or could be, exercising some control, directly or indirectly, over the employee's activities.' " *Id.* at 1020 (citation omitted). According to the court, acts such as theft are not committed in furtherance of the employee's duties. *Id.*

Similarly, in *Baker v. Lansdell Protective Agency, Inc.*, 1985 WL 3964 (S.D.N.Y. Nov. 22, 1985), plaintiff sought the full value of jewelry allegedly stolen by defendant's employee at Kennedy International Airport. Relying on *Rymanowski*, the court granted the defendant's motion for summary judgment and held that Article 25(2)'s limitation of liability exception was inapplicable because theft was outside the scope of an employee's duties. *Id.* at *3.

Another court reached the same holding in *Denby v. Seaboard World Airlines, Inc.*, 575 F. Supp. 1134, 1148 (E.D.N.Y. 1983), *rev'd on other grounds*, 737 F.2d 172 (2d Cir. 1984). In that case, the plaintiff sued an air carrier for the market value of silver that was stolen by defendant's employee during air transit from England to New York. The *Denby* court cited *Rymanowski* and held that the Warsaw Convention's limited liability exception was unavailable because the employee's theft fell outside scope of employment and, therefore, did not amount to wilful misconduct on the part of the airline carrier.

Apparently, every American court to address this issue has held that the wilful misconduct exception to the Warsaw Convention's limitation of liability does not apply to acts of theft committed by employees. Brink's acknowledges this but nevertheless argues that *Rymanowski* and its progeny were wrongly decided because they erroneously applied American tort law concepts to their interpretation of the Warsaw Con-

vention. Brink's cites decisions of foreign courts holding that theft by an air carrier's employee does constitute wilful misconduct under the Convention. *See, e.g., Rustenburg Platinum Mines, Ltd. v. South African Airways*, [1977] 1 Lloyd's Rep. 564 (Queen's Bench) (Commercial Court), *aff'd*, [1979] 1 Lloyd's Rep. 19 (English Court of Appeal) (theft amounted to wilful misconduct of air carrier under Warsaw Convention); *Air Canada v. Swiss Bank Corp.* [1988] 1 F.C. 71 (Canadian Federal Court of Appeals) (same).

Brink's also cites a Second Circuit decision rendered subsequent to the *Rymanowski* line of cases which states that the Warsaw Convention was intended to serve as uniform, international law for air carrier liability. *In re Air Disaster at Lockerbie, Scotland on December 21, 1988*, 928 F.2d 1267, 1287 (2d Cir.), *cert. denied*, 502 U.S. 920 (1991) ("*Lockerbie*"). According to Brink's, *Lockerbie* supports the proposition that *Rymanowski's* interpretation of wilful misconduct frustrated the purpose of the Warsaw Convention by contradicting the interpretation given to it by the international community.

Part of the uniform scheme envisioned by the drafters of the Warsaw Convention, however, was the application of local laws to certain questions. *See, e.g.*, Article 21 (allowing application of local rules to determine contributory negligence); Article 22(1) (allowing application of local law regarding issue of periodic payment of damages); Article 28(1) (permitting the resolution of procedural issues under local law); Article 29(2) (requiring statute of limitation issues to be determined under local law).

In fact, Article 25(1) specifically states that the standard for wilful misconduct is to be determined "in accordance with the law of the court to which the case is submitted." As a matter of fundamental statutory construction, the word "similarly" at the beginning of 25(2)—the applicable provision to the instant action—indicates that this section should be read in conjunction with the preceding provision, Article 25(1). Wilful misconduct under 25(2) should therefore be determined in the same manner as it is under 25(1)—by application of local law. Accordingly, this Court finds no reason to disturb

Rymanowski's holding that theft by an air carrier's employee does not constitute wilful misconduct under the Warsaw Convention.

B. *Air Waybill*

Brink's next claims that SAA should not be entitled to the Warsaw Convention's limitation of liability because its air waybill did not comply with the requirements of Article 8. Article 8 states, in pertinent part, that:

> The air waybill shall contain the following particulars:
>
> (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the transportation of its international character;
>
> (e) The name and address of the first carrier.

Article 9 covers violations of Article 8:

> If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in Article 8(a) to (i), inclusive, and (q), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability.

Plaintiff claims that SAA's waybill violated Article 8(c) and (e) by failing to mention the stopover in Ilha do Sal, the Cape Verde Islands, and by failing to list SAA's address.

To support its position, Brink's cites *Maritime Insurance Co., Ltd. v. Emery Air Freight Corp.*, 983 F.2d 437 (2d Cir. 1993), where the court held that the defendant air carrier was not entitled to Article 8's liability limitation because its waybill did not contain four Article 8 particulars. *Id.* at 441. In reaching its decision, the *Maritime* court stated that "[b]oth precedent and reason counsel that courts refrain from altering even slightly the plain, unambiguous language of a treaty negotiated among diverse sovereign nations." *Id.* at 440.

Here, Brink's alleges that SAA's failed to list the stopover in Ilha do Sal, which amounts to a violation of Article 8(c). SAA's waybill, however, states:

> The first Carrier's address is the airport of departure shown on the face hereof. The agreed stopping places (which may be altered by Carrier in case of necessity) are those places, except the place of departure and the place of destination, set forth on the face hereof or shown in Carrier's timetable as scheduled stopping places for the route . . . .

As Ilha do Sal is a regularly scheduled stop on SAA Flight 201, this language satisfies the requirements of Article 8(c).

The only Article 9 particular, therefore, that SAA neglected to include was its address on the waybill. SAA's address is easily ascertainable and this oversight alone should not and will not preclude SAA from employing the Warsaw Convention's liability limitation.

III. *Conclusion*

Consistent with this opinion, SAA's motion for partial summary judgment is GRANTED.

SO ORDERED.

Dated: New York, New York
April 14, 1995

/s/ HAROLD BAER, JR.
Harold Baer, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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94 Civ. 1902 (HB)
Filed: August 14, 1995

BRINK'S LIMITED,

Plaintiff,

—against—

SOUTH AFRICAN AIRWAYS,

Defendant.

JUDGMENT

The defendant, South African Airways, having moved on March 27, 1995 for partial summary judgment limiting its liability to a maximum of $20.00 per kilo under Article 22 of the Warsaw Convention and the Court on April 14, 1995 having granted defendant's motion; and the Court on July 17, 1995 having denied the motion of the plaintiff Brink's Limited for re-argument, and the defendant not having objected to the entry of a judgment for its maximum liability under the Warsaw Convention, $1,522.00 (for the alleged loss of 76.12 kilos of palladium and rhodium) it is hereby

ORDERED, ADJUDGED AND DECREED that the plaintiff, Brink's Limited, shall have judgment against the defendant, South African Airways in the amount of $1,522.00.

Dated: New York, New York
July 31, 1995

/s/ ILLEGIBLE
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Filed: September 20, 1996

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 20th day of September one thousand nine hundred and ninety-six.

Present:

Hon. J. Edward Lumbard
Hon. Thomas J. Meskill
Hon. Roger J. Miner
CIRCUIT JUDGES,

Brink's Limited

Plaintiff-Appellant,

—v.—

South African Air

Defendant-Appellee.

A petition for rehearing having been filed herein by defendant-appellee South African Airways,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

GEORGE LANGE III, Clerk

By: BETH J. MEADOR
Beth J. Meador,

Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 95-7872
Filed: August 8, 1996

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 8th day of August, one thousand nine hundred and ninety-six.

PRESENT: HON. J. Edward Lumbard
HON. Thomas J. Meskill
HON. Roger J. Miner
Circuit Judges

BRINK'S LIMITED,

Plaintiff-Appellant,

—v.—

SOUTH AFRICAN AIRWAYS,

Defendant-Appellee.

Appeal from United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED, and DECREED that the judgment of said district court be and it hereby is affirmed in part, reversed in part, and remanded to the said district court for further proceedings in accordance with the opinion of this court.

For the Court
GEORGE LANGE III, Clerk

By: KATHLEEN BROUWER
Kathleen Brouwer
Operations Manager